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EXAMINER

JOHNSON, JENNA LEIGH

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES M. SHEPPARD JR.

Appeal 2009-002790
Application 09/837,094
Technology Center 1700

Decided:¹ June 18, 2009

Before JOSEPH F. RUGGIERO, MAHSHID D. SAADAT,
and ROBERT E. NAPPI, *Administrative Patent Judges*.

SAADAT, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

Appellant appeals under 35 U.S.C. § 134(a) from a Final Rejection of claims 21, 22, and 24-27. Claims 1-20 and 23 have been canceled. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

STATEMENT OF THE CASE

Appellant's invention relates to a method for making a textile article comprising the steps of providing a two-sided multicolor Jacquard or Dobby woven textile and transferring a graphic impression on said textile. The first embodiment has a dark color border with a light color central section.

(Spec. 5.) Claim 21, which is representative of the claims on appeal, reads as follows:

21. A towel having a graphic impression, produced by:

weaving a towel on a Dobby loom using at least two different colors of yarn, such that a border having a first darker color is woven adjacent each edge of said towel, on one side thereof, and a border having a second lighter color is woven adjacent of said towel on the other side, said towel having a central area woven within said borders on both said one side and said other side, said central area on said other side is woven with said first darker color, said central area on said one side is woven with said second lighter color,

shearing said one side to a height of about 75 to about 95% of the height of said other side;

blooming said one side such that a graphic impression can be intensely applied thereto;

forming a graphic impression in said central area on said one side, wherein said towel retains its preprinted water absorbency characteristics; and

wherein said border on said one side is capable of masking said graphic impression that may overlap onto said

border from said central area on said one side, eliminating the need for precise alignment of said graphic impression within said central area of said one side; and wherein said central area on said second side is capable of masking any potential bleed through of said graphic impression from said central area of said one side.

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Parker	US 1,925,459	Sep. 5, 1933
Terrasse	US 2,163,769	Jun. 27, 1939
Stark	US 3,669,818	Jun. 13, 1972
Sherrill	US 3,721,273	Mar. 20, 1973

Claims 21, 22, and 24-27 stand rejected as being unpatentable under 35 U.S.C. § 103(a) over Stark, Parker, and Sherrill.

Claims 21, 22, and 24-27 stand rejected as being unpatentable under 35 U.S.C. § 103(a) over Stark, Parker, Terrasse, and Sherrill.

Claims 21, 22, and 24-27 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 21-36 of copending Application No. 09/747,529.

We refer to the Briefs (Appeal Brief filed Mar. 31, 2008, and Reply Brief filed Aug. 11, 2008) and the Answer (mailed Jun. 11, 2008) for their respective details.

ISSUE

Has Appellant shown error in the Examiner's conclusion that substantial evidence before us shows that under 35 U.S.C. § 103, the combination of Stark, Parker, and Sherrill or the combination of Stark, Parker, Terrasse, and Sherrill teaches or suggests the claimed subject matter? Specifically, Appellant and the Examiner disagree as to whether one of

ordinary skill in the art would have combined the reference teachings to show a border having a first darker color woven on one side leaving a lighter color central area, wherein the darker border is capable of masking the graphic impression that may overlap onto the border and the darker central area on the back is capable of masking any potential bleed through from the lighter color central area, as recited in claim 21.

FINDINGS OF FACT

The following findings of fact (FF) are relevant to the issue involved in the appeal.

Stark

1. Stark relates to textile products where various patterns may be produced in the surface of the fabric itself by varying the construction of the pile surface of the fabric. (Col. 1, ll. 26-31.)
2. Stark discloses color print designs superimposed on the fabric in registry with sections of existing pattern in the surface of the fabric. (Col. 1, ll. 43-47; col. 2, ll. 22-24.)
3. Stark describes constructing the surface pattern of the fabric by using high or low loop pile yarns, as well as cut pile yarns. (Col. 2, ll. 28-31.)
4. Stark further describes one of the possible print designs as superimposed on the pattern pile fabric, so long as the pile pattern and the printed design are out of registry with one another. (Col. 2, ll. 39-46.)

Sherrill

5. Sherrill describes a woven terry towel having cut pile surface which is not only soft, but also more suitable for color printing on its flat surface. (Col. 4, ll. 9-27.)

Parker

6. Parker is concerned with weaving terry fabrics having patterns woven in a contrasting yarn. (P. 1, ll. 1-4.)

7. Parker discloses colored patterns in the form of stripes (p. 1, ll. 12-14), while the colors of the pattern and background on the face are the reverse of those on the back (p. 1, ll. 19-20, 28-34).

Terrasse

8. Terrasse relates to a woven fabric having a reversible pattern. (Col. 1, ll. 1-8.)

9. Terrasse discloses the reverse pattern as areas of white and blue color where each color on one side is matched to the other color on the other side for each pattern area. (Col. 2, ll. 49-55.)

PRINCIPLES OF LAW

In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the Examiner to establish a factual basis to support the legal conclusion of obviousness. *See In re Fine*, 837 F.2d 1071, 1073 (Fed. Cir. 1988). In so doing, the Examiner must make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966) (stating that 35 U.S.C. § 103 leads to three basic factual inquiries: the scope and content of the prior art, the differences between the prior art and the claims at issue, and the level of ordinary skill in the art). “[T]he examiner bears the initial burden,

on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability.” *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

The test for obviousness is what the combined teachings of the references would have suggested to one of ordinary skill in the art. *See In re Kahn*, 441 F.3d 977, 987-88 (Fed. Cir. 2006); *In re Young*, 927 F.2d 588, 591 (Fed. Cir. 1991); *In re Keller*, 642 F.2d 413, 425 (CCPA 1981).

Section 103 forbids issuance of a patent when “the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007).

A step in the obviousness analysis is to “determine whether there was an apparent reason to combine the known elements in the fashion claimed.” *KSR*, 550 U.S. at 418. A rejection for obviousness must include “‘articulated reasoning with some rational underpinning to support the legal conclusion.’” *Id.* (quoting *Kahn*, 441 F.3d at 988). The proper question to ask is whether a person of ordinary skill in the art would have seen a benefit to combining the prior art teachings. *KSR*, 550 U.S. at 424.

ANALYSIS

Claim Rejection over Stark, Parker, and Sherrill

The Examiner proposed combining the reverse pattern of Parker and the cut pile yarn of Sherrill with the printed pattern of Stark (Ans. 3-5). The explanation given for why one of skill in the art would have thought it desirable to combine the references was “[h]ence, the different colored sections in the fabric taught by Parker et al. can be enriched by applying a

printed pattern to the fabric” (Ans. 4). The Examiner further characterizes the limitations regarding the locations of the different color regions and the printed pattern as related “purely to ornamentation,” which “do[es] not effect [sic] the function of the fabric itself” (Ans. 6). Thus, the Examiner did not give patentable weight to the limitations requiring that the first colored region form a border and the second color region form a central area (*id.*).

We identify two problems with this reasoning: (1) the Examiner has not pointed to any evidence of record that Stark provides for masking the overlap or bleed through of the printed graphic impression by the darker border and the darker central area on the back, and (2) the Examiner has not pointed to any evidence of record that Sherrill is concerned with misalignment or bleeding of the printed pattern on the cut pile surface. We also disagree with the Examiner’s characterization of the functional limitations recited in claim 21 as merely related to the appearance and ornamentation of the fabric.

The specific claimed requirements related to the relative position of the print pattern with respect to the darker border and the darker central area on the back correspond to the reverse pattern and coloring of the woven fabric and selecting the lighter color central area for printing. As argued by Appellant (App. Br. 8), such an arrangement eliminates the need for precise alignment of the graphic impression on the front side while the darker pattern on the reverse side masks any bleed through of the printed pattern.

Additionally, we find that Stark’s woven patterns (FF 1) and the color print superimposed on the fabric (FF 2-3) are positioned intentionally out of registry with no regard for placing the print on the dark area in contrast to the light area (FF 4). Sherrill also provides a mere suggestion for using the

cut pile surface for printing (FF 5) with no specific suggestion for masking the pattern by the dark areas. We also find that Parker's disclosure is limited to woven color patterns (FF 6-7). However, the Examiner has not identified any disclosure that the cited references selected the dark and light colors for the woven border and the central area in order to mask the printed pattern by the dark color border or to mask the bleed through by a dark area on the back. We also agree with Appellant (App. Br. 7; Reply Br. 3) that the only relationship between the woven and the printed patterns required in Stark is an out of registry design (FF 4).

Therefore, the Examiner has not articulated sound reasons for concluding that the claimed relationship between the woven and printed areas would have been obvious. The prior art gives no direction as to how the many possibilities of combining woven patterns and printed designs would have resulted in the claimed requirement for the colored woven pattern on two sides of the towel and the specific relational positioning of the border and the central area. We conclude that a prima facie case for obviousness with respect to the rejection of claims 21, 22, and 24-27 over Stark, Parker, and Sherrill was not made on this record.

Claim Rejection over Stark, Parker, Terrasse, and Sherrill

The Examiner rejected claim 21, 22, and 24-27 based on Stark, Parker, Terrasse, and Sherrill (Answer 8-10). The Examiner, however, cited Terrasse for teaching a woven fabric of a reversible pattern composed of two colors (FF 8-9) and pointed to nothing in the reference that would provide a reason to combine such teachings with Stark, Parker, and Sherrill, or to compensate for the deficiencies of the combination discussed above. For the reasons discussed above, we also conclude that a prima facie case for

obviousness with respect to the rejection of claims 21, 22, and 24-27 based on the teachings of Stark, Parker, Terrasse, and Sherrill was not made on this record.

CONCLUSION

The record does not establish there was a reason for a person of ordinary skill in the art, informed by the reference disclosures and their own knowledge of the art, to produce a towel in which a border having a first darker color is woven on one side leaving a lighter color central area wherein the border on that side is capable of masking a graphic impression that may overlap onto the border and the darker central area on the back is capable of masking any potential bleed through from the lighter color central area, as recited in claim 21. We, therefore, do not sustain any of the 35 U.S.C. § 103(a) rejections of claims 21, 22, and 24-27.

With respect to the rejection of the claims under obviousness-type double patenting, Appellant concedes the propriety of the rejection by indicating Appellant's willingness to file a terminal disclaimer (App. Br. 12). We therefore, sustain the provisional rejection of claims 21, 22, and 24-27 under the judicially created doctrine of obviousness-type double patenting.

ORDER

Since we have sustained at least one rejection of all of the appealed claims, the decision of the Examiner rejecting claims 21, 22, and 24-27 is affirmed.

Appeal 2009-002790
Application 09/837,094

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. 1.136(a)(1)(iv).

AFFIRMED

babc

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